Supreme Court, U.S.
FILED
FEB 3 - 2006
OFFICE OF THE CLERK

No. 05-1018

In The

Supreme Court of the United States

JOGA SINGH JOHAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit United States Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

SHERYL GORDON MCCLOUD
LAW OFFICES OF
SHERYL GORDON MCCLOUD
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101-2605
(206) 224-8777

Counsel of Record for Joga Singh Johal

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Title 21 U.S.C. § 841(c)(2) makes it a felony to sell over-the-counter cold tablets containing pseudoephedrine if the defendant has knowledge or "reasonable cause to believe" that the pseudoephedrine will be "used to manufacture a controlled substance. . . ." The Ninth Circuit upheld a conviction in which jury instructions defined "reasonable cause to believe" as what a "reasonable person" would believe.

a. The Ninth Circuit construed § 841(c)(2) as permissibly establishing an objective intent standard for this serious felony. Does this conflict directly with decisions of the Tenth Circuit, summarized most recently in *United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005), holding that § 841(c)(2) must be construed as establishing a subjective intent standard?

b. The Ninth Circuit also ruled that the "reasonable person" instructions raised no constitutional or interpretive issues concerning the *mens rea* for this serious felony, because that language actually conveyed a subjective intent standard. Does this decision conflict in principle with decisions of this Court and the sister circuits, interpreting "reasonable cause to believe" and "reasonable person" language as creating an objective intent standard in all other areas of the law?

2. Does the Ninth Circuit's decision conflict in principle with decisions of this Court holding that comparable language should not be construed to create a disfavored strict liability felony?

QUESTIONS PRESENTED – Continued

3. Section 841(c)(2) makes it a crime to sell pseudoephedrine when there is reasonable cause to believe it "*will* be used to manufacture a controlled substance." Here, it was undisputed that the cold pills were sold to DEA agents or informants and, hence, "will" *not* be so used. Does the Ninth Circuit's affirmance conflict with holdings of the Fifth and Seventh Circuits construing gun control statutes with similar language, and does it conflict with decisions of this Court holding that statutory language should not be ignored or treated as superfluous?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
I. PROCEDURAL HISTORY	3
A. The Charges	3
B. Pre-Trial Motions	4
C. The First, Hung, Jury	4
D. The Second Trial	5
II. THE SECOND TRIAL	5
A. The Parties' Theories	5
B. The Government's Case	6
1. March 7, 2002	6
2. March 13, 2002	8
3. August 13, 2002	9
C. The Defense Case	9
D. Sentencing	9
REASONS FOR GRANTING THE WRIT	11

TABLE OF CONTENTS – Continued

Page

I. THE NINTH CIRCUIT ESSENTIALLY ADOPTED AN OBJECTIVE INTENT STANDARD FOR § 841(c)(2). THIS CONFLICTS WITH THE TENTH CIRCUIT'S DECISION THAT § 841(c)(2) MUST BE CONSTRUED AS ADOPTING A SUBJECTIVE INTENT STANDARD, INSTEAD 11

II. THE NINTH CIRCUIT'S DECISION TO CALL "REASONABLE CAUSE TO BELIEVE" BY A "REASONABLE PERSON" A SUBJECTIVE INTENT STANDARD (THUS SAVING § 841(c)(2) FROM CONSTITUTIONAL DEFICIENCY) CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER CIRCUITS HOLDING THAT SUCH LANGUAGE CREATES AN OBJECTIVE INTENT STANDARD 15

III. THE NINTH CIRCUIT'S DECISION UPHOLDING § 841(c)(2) CONVICTIONS BASED ON THE "REASONABLE CAUSE TO BELIEVE" AND "REASONABLE PERSON" STANDARD CONFLICTS WITH THE HOLDINGS OF *STAPLES*, *X-CITEMENT VIDEO*, *LIPAROTA*, AND *MORISSETTE* THAT CRIMES LACKING SCIENTER ARE DISFAVORED 17

A. This Court Has Consistently Held that Crimes Lacking Scienter are Disfavored ... 17

B. The Only Exception is for Public Welfare Offenses, That is, Crimes Penalizing Acts that are Inherently Dangerous 18

TABLE OF CONTENTS – Continued

Page

C. Selling Over-the-Counter Cold Remedies Does Not Fall into this Narrow Category of Inherently Dangerous Activities 18

D. This Court Must Construe § 841(c)(2) As Having a *Mens Rea* Requirement to Save It From Unconstitutionality 20

IV. THESE § 841(c)(2) CRIMES REQUIRE PROOF THAT THE PSEUDOEPHEDRINE "*WILL BE* USED TO MANUFACTURE" METHAMPHETAMINE, BUT THE PROOF HERE SHOWED THAT IT *WILL NOT BE* SO USED BECAUSE IT WAS OBTAINED BY INFORMANTS. THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE FIFTH AND SEVENTH CIRCUITS CONCERNING STING OPERATIONS, AND WITH DECISIONS OF THIS COURT ON STATUTORY INTERPRETATION 25

V. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR REVIEWING THESE ISSUES, BECAUSE *MENS REA* WAS THE KEY DISPUTED ELEMENT 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Cheek v. United States, 498 U.S. 192 (1991) 24

Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573 (1st Cir. 1980) 16

Crawford-El v. Britton, 523 U.S. 574 (1998) 15

FiveCAP, Inc. v. NLRB, 294 F.3d 768 (6th Cir. 2002) 16

Griffin v. United States, 502 U.S. 46 (1991) 27

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 15

In re Su, 290 F.3d 1140 (9th Cir. 2002) 16

Kravetz v. Joange Building Corp., 341 F.2d 561 (2d Cir. 1965) 16

Lambert v. California, 355 U.S. 225 (1957) 19

Liparota v. United States, 471 U.S. 419 (1985) 17, 19, 20, 23

Morissette v. United States, 342 U.S. 246 (1952) 17, 18, 22, 23

Neder v. United States, 527 U.S. 1 (1999) 28

Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003) 16

Ratzlaf v. United States, 510 U.S. 135 (1994) 26, 27

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 27

Scales v. United States, 367 U.S. 203 (1961) 17

Staples v. United States, 511 U.S. 600 (1994) ..... *passim*

United States v. Balint, 258 U.S. 250 (1922) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Buonocore, 416 F.3d 1124 (10th Cir. 2005) 13, 14

United States v. Dotterweich, 320 U.S. 277 (1943) 19

United States v. Galvan, 407 F.3d 954 (8th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 497 (2005) 12, 13

United States v. Green, 779 F.2d 1313 (7th Cir. 1985) 26

United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971) 19

United States v. Johal, 421 F.3d 955 (9th Cir. 2005) 2, 12, 15

United States v. Kaur, 382 F.3d 1155 (9th Cir. 2004) 12

United States v. Kraase, 484 F.2d 549 (7th Cir. 1973) 16, 26

United States v. Plyman, 551 F.2d 965 (5th Cir. 1977) 26

United States v. Prather, 205 F.3d 1265 (11th Cir.), *cert. denied*, 531 U.S. 879 (2000) 13, 26

United States v. Saffo, 227 F.3d 1260 (10th Cir. 2000) 13, 14

United States v. Truong, 425 F.3d 1282 (10th Cir. 2005) 12, 13

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 17, 19

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 17, 21, 22, 23, 24

Williams v. United States, 458 U.S. 279 (1982) 27

TABLE OF AUTHORITIES – Continued

Page

STATUTES

7 U.S.C. § 2024(b)(1) 23
18 U.S.C. § 641 22
18 U.S.C. § 2252 21
18 U.S.C. § 5861(a)(6) 24
18 U.S.C. § 922(a) 26
21 U.S.C. § 841(c)(2) ..... *passim*
21 U.S.C. § 843(6) 12
28 U.S.C. § 1254(1) 2

CONSTITUTIONS AND CODES

U.S. Const. amend. V 3

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joga Singh Johal petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals (App. 1-14), which became final on November 9, 2005.

OPINIONS BELOW

Mr. Johal was convicted of two counts of violating 21 U.S.C. § 841(c)(2) for distribution of pseudoepehedrine while having "reasonable cause to believe" that it would be used to manufacture a controlled substance (methamphetamine) – once on March 7, 2002 and once on March 13, 2002. He was also convicted of one count of unlawful possession of pseudoephedrine, on August 13, 2002, in violation of that same statute, using that same "reasonable cause to believe" standard.

The defendants filed written motions arguing that § 841(c)(2) appeared to lack a subjective *mens rea* requirement and, if it was so interpreted, then it was unconstitutional. Alternatively, the defendants sought jury instructions defining "reasonable cause to believe" as a subjective intent standard. The district court denied the motions. App. 51-56; App. 57-59.

Judgment was entered on December 18, 2003. App. 41-50. An Amended Judgment was entered on January 14, 2004. App. 31-40. The Notice of Appeal was filed on December 18, 2003.

The Ninth Circuit affirmed in an Opinion dated August 30, 2005. App. 16-29. The decision became final

when, following appellee's motion to modify, an Order and Amended Opinion was filed on November 9, 2005. *United States v. Johal*, 421 F.3d 955 (9th Cir. 2005), App. 1-14.

JURISDICTION

The decision of the Ninth Circuit U.S. Court of Appeals became final on November 9, 2005. App. 1-14. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 21 U.S.C. § 841(c), "Offenses involving listed chemicals," provides:

> Any person who knowingly or intentionally –
>
> (1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;
>
> (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or
>
> (3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

> shall be fined in accordance with Title 18, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. The Charges

Mr. Johal was charged on August 6, 2002, with one count of violating 21 U.S.C. § 841(c)(2). The indictment alleged that on March 13, 2002, in Spokane, Washington, he distributed 6,912 pills, each containing 30 mg. of pseudeoephedrine, "knowing or having reasonable cause to believe" that they "would be used to manufacture